U.S. Department of Labor

Office of Administrative Law Judges
O'Neill Federal Building - Room 411
10 Causeway Street
Boston, MA 02222

(617) 223-9355
(617) 223-4254 (FAX)

Issue Date: 31 January 2006CASE NO.: 2005-LHC-2156
2005-LHC-2157

OWCP NO.: 01-161826
01-31711

In the Matter of

MATTHEW KWASNIEWSKI
Claimant

v.

ELECTRIC BOAT CORPORATION
Employer/Self-Insured

NOVA GROUP
Employer

and

LIBERTY MUTUAL INSURANCE COMPANY
Carrier

Appearances:

David N. Neusner, Esq., Embry and Neusner, Groton, Connecticut,
for the Claimant

Edward W. Murphy, Esq., Morrison Mahoney LLP, Boston, Massachusetts,
for Electric Boat Corporation

Dennis M. Maher, Esq., Black, Cetkovic & Whitestone, Boston, Massachusetts,
for Nova Group and Liberty Mutual Insurance Company

Before: Colleen A. Geraghty
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

I. Statement Of The Case

The present matter is a claim for workers' compensation and medical benefits filed by Matthew Kwasniewski ("Claimant") against the employers Electric Boat Corporation ("EBC" or "Electric Boat") and Nova Group ("Nova") and Nova's insurance carrier Liberty Mutual Insurance Company ("Carrier") under the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (the "Act"). After an informal conference before the District Director of the Department of Labor's Office of Workers' Compensation Programs ("OWCP"), the matter was referred to the Office of Administrative Law Judges for a formal hearing, which was conducted before the undersigned administrative law judge on November 16, 2005 in New London, Connecticut.

The Claimant appeared represented by counsel, and an appearance was made on behalf of the Employers and Carrier. At the hearing, the parties were afforded the opportunity to present evidence and oral argument. Testimony was heard from the Claimant. Documentary evidence was admitted as Joint Exhibit ("JX") 1, Claimant's Exhibits ("CX") 1-12, Electric Boat's Exhibits ("EB EX") 1-4, and Liberty Mutual's Exhibits on behalf of employer Nova ("LM EX") 1-4.[1] Formal papers were admitted as Administrative Law Judge Exhibits ("ALJX") 1-17. The record was held open until November 30, 2005 to permit Nova Group to take the deposition of Dr. Lawrence. ALJX 14. Thereafter, Nova timely submitted Dr. Lawrence's deposition which has been marked as LM EX 5 and admitted. The parties filed post-hearing briefs, and the record is now closed.

After careful analysis of the evidence contained in the record, the parties' stipulations, and their closing arguments, I have concluded that the Claimant is entitled to temporary total disability compensation benefits for the period of June 6, 2003 through December 20, 2004. Thereafter, the Claimant is entitled to permanent total disability benefits beginning December 21, 2004 through the present and continuing. I have also concluded that Nova and its carrier Liberty Mutual Insurance is the responsible employer and carrier.[2]

My findings of fact and conclusions of law are set forth below.

II. Stipulations and Issues Presented

At hearing, the parties stipulated to the following: (1) The Act applies to the present claim; (2) An employment relationship existed at all relevant times of the Claimant's employment with Nova Group and Electric Boat Company; (3) The Claimant sustained an injury to his left knee on October 3, 1977, which arose during the course of his employment with

[1] Nova's objection to Claimant's Exhibit 3 was overruled and the exhibit was admitted. TR 11-12. In addition, the court denied Nova's attempt to offer a vocational expert as a witness as no notice was provided to the other parties. TR 13-14.

[2] This matter is being decided on an expedited basis as a result of financial hardship the Claimant is experiencing. Electric Boat discontinued compensation benefits to the Claimant in September 2005 when it concluded that it was not the responsible employer. Nova has contested its liability and so neither Employer has been paying benefits since September 1, 2005.

Electric Boat at its shipyard in Groton, CT; (4) The Claimant worked for Nova Group at the U.S. Naval Submarine Base in Groton, CT, from March 1995 through August 18, 1996; (5) The Employers filed timely notices of controversion; (6) The Claimant reports he injured his knee on August 18, 1996 at Nova Group; (7) An informal conference was held at the OWCP in Boston, MA on June 29, 2005; (8) The Claimant filed a timely notice of injury and a timely claim for compensation in regard to the 1977 injury while employed at Electric Boat; (9) The Claimant's average weekly wage at the time of injury was $249.46 while at Electric Boat, and $1072.00 while employed by Nova Group; (10) Electric Boat has paid Claimant medical benefits in the amount of $46,943.72; (11) The Claimant reached maximum medical improvement on December 21, 2004. JX 1; TR 5-6.

The remaining issues to be adjudicated at hearing are (1) timeliness of the claim against Nova; (2) the responsible employer/carrier; (3) causation of the current impairment; (4) the nature and extent of the Claimant's disability; and (5) whether Nova is required to reimburse Electric Boat for benefits paid the Claimant should Nova be deemed the responsible carrier.

III. Findings of Fact and Conclusions of Law

A. Background

The Claimant was 54 years old at the time of hearing. TR 29. Claimant worked for EBC in Groton, CT for approximately 16 years, from 1973 to 1989. *Id.* at 30. During his course of employment at EBC, Claimant worked primarily as a carpenter, which required him to engage in frequent bending, stooping, climbing, kneeling, and crawling. *Id.* at 32-35. The Claimant engaged in numerous forms of construction while working for EBC including installing insulation to the submarines docked at the Naval Base, building staging and scaffolding, and setting up blocking mechanisms to allow the submarines to be lifted out of the surrounding water. *Id.* at 31-36. In 1977 Claimant suffered a serious knee injury as a result of slipping on a plastic bag while working at EBC. *Id.* at 36, 37. Dr. Coulson performed knee surgery, a meniscectomy involving the complete removal of Claimant's cartilage in his left knee, on January 21, 1978. CX 6 at 1-2. Following surgery, the Claimant returned to his job at EBC and remained there until 1989 but he continued to experience pain after kneeling and crawling. *Id*. at 39, 48. EBC paid Claimant temporary total disability compensation for his knee condition for various periods throughout the remainder of Claimant's employment with EBC. JX 1. On December 10, 1979, Dr. Coulson's office note indicates that the Claimant has experienced persistent symptoms with a number of flare-ups of left knee pain after minor incidents at work and he comments that he believes the Claimant was beginning to develop arthritis in the knee. CX 6 at 7.

After leaving EBC in 1989, the Claimant performed various construction jobs with numerous employers, working out of the union hall. TR 48-51. The Claimant worked for Respondent Nova Group for eighteen months during 1995 and 1996, constructing piers extending into the Thames River at the U.S. Naval Submarine Base in Groton, CT. *Id.* at 43. This job involved the repairing, removal, and construction of numerous piers. *Id.* The construction of the piers required the Claimant and his co-workers to pour concrete into wooden forms that were utilized to shape the concrete, and then to work from the water to strip the wood

from the newly formed concrete forms. *Id.* at 43-47. The work required of Claimant during his employment at Nova Group consisted of extensive kneeling, crawling, and climbing. *Id.* at 45-47. Although acknowledging that he suffered pain in his left knee throughout the course of his employment at Nova Group, the Claimant never notified his employer of any injury sustained while on the job, nor did he seek any medical treatment for his knee during his employment at Nova Group. *Id.* at 66-67.

The Claimant testified that he worked various construction-related jobs upon the completion of his employment at Nova Group on August 18, 1996. TR 48-53. Working out of the local union halls, Claimant worked numerous short-term construction jobs, the vast majority of which required him to undergo extensive kneeling, squatting, bending, stooping, and climbing. EB EX 1 at 23-36. Claimant's employment history continued steadily until the Spring of 2003, when he lost his job as a loader with U.S. Foods Services because he could not perform the required work fast enough. TR 52-53. Claimant's job responsibilities as a loader at U.S. Foods Services required bending and lifting which the Claimant was unable to perform as expected because of significant knee pain. *Id.* at 53-54.

The Claimant's knee condition deteriorated to the point that he was forced to undergo total knee replacement surgery on December 2, 2003. TR at 54. The surgery was performed by Dr. Frank Maletz. CX 2; EB EX 1 at 56. EBC initially accepted liability for the surgery based on the initial 1977 injury, and it paid the Claimant weekly temporary total disability benefits from June 6, 2003 through September 1, 2005. JX 1. Following Dr. Maletz's deposition, Electric Boat contended it was not the responsible employer and it ceased compensation benefits on September 1, 2005. The Claimant reached a level of maximum medical improvement on December 21, 2004. *Id.* The Claimant is no longer receiving medical compensation from Electric Boat and continues to experience extreme discomfort in his knees as a result of his employment-related injuries and subsequent surgeries. *Id.*; TR 54-56. Claimant testified that he is unable to secure any employment because of his inability to follow a schedule as he has to ice his knee daily, and avoid sitting for long periods. TR 54-57, 71-72.

B. Medical Treatment

1. Louis Coulson

Dr. Louis Coulson, an orthopedic surgeon, treated the Claimant following his October 1977 left knee injury. CX 6. Dr. Coulson performed a meniscectomy of the left knee to repair a torn meniscus which included removing the cartilage on January 21, 1978. CX 6 at 1-3. The Claimant returned to work sometime on April 12, 1978. CX 6 at 5, 10. Dr. Coulson saw the Claimant through 1987. On January 14, 1979, Dr. Coulson indicated that the Claimant had experienced a flareup in left knee pain and he was off work a few days. Dr. Coulson notes that x-rays showed a mild progression of hypertrophic bony spurring in the medial femoral condyle. CX 6 at 6. Dr. Coulson opined that the Claimant had reached maximum medical improvement and he assessed a 15% permanent impairment of the left knee. *Id.* On December 10, 1979, Dr. Coulson in a letter to Electric Boat's Insurance Carrier, indicated that the Claimant continued to have pain in the left knee with stress and especially if the knee is held flexed for any period of time. On examination, Dr. Coulson found a normal gait, full range of motion of the left knee,

but he noted slight retropatella crepitus. He also indicated that x-ray findings showed degenerative mild to moderate degenerative changes. He also stated that degenerative arthritis was developing. CX 6 at 7. Finally, Dr. Coulson opined that the Claimant's permanent impairment of the left knee had increased to 20%. *Id.* Dr. Coulson continued to see the Claimant for left knee pain caused by climbing and crawling and spraining his knee at work on occasion through 1987. CX 6 at 11, 9-24. Dr. Coulson noted that the Claimant receives a ride from the parking lot to his work site at Electric Boat. CX 6 at 25.

2. Donald Sprafke, M.D.

After Dr. Coulson's retirement, the Claimant saw Dr. Donald Sprafke, an orthopedic physician from 1988 until 1994. CX 7. He reported left knee pain with work activity on occasion and was treated with physical therapy and rest on occasion. CX 7 at 2-5. Dr. Sprafke's notes indicate that he discussed future surgery with the Claimant on October 21, 1993. CX 7 at 5. The Claimant last saw Dr. Sprafke some time in 1994. *Id*.

3. Dr. Frank Maletz

Dr. Maletz, an orthopedic surgeon with Thames River Orthopaedic Group, began treating the Claimant for his knee condition on June 16, 1999, following the retirement of Drs. Coulson and Sprafke. CX 2 at 16; CX 3 at 6-7. At his first visit, Dr. Maletz reviewed the treatment records of the Claimant's prior orthopedic physicians Drs. Coulson and Sprafke. He noted the Claimant's 1977 injury and subsequent total meniscectomy in 1978. Dr. Maletz also noted that the Claimant had begun to develop osteoarthritis in the left knee by 1979. CX 2 at 1-2. By his examination in June 1999 he testified that he observed the left knee as extremely crepitant, meaning a bone on bone quality to the range of motion. CX 3 at 10. After reviewing the Claimant's medical records and after examination, Dr. Maletz concluded that the Claimant "has all of the known problems related to a total meniscectomy including a profound progressive osteoarthritis primarily over the medical joint line. These Fairbanks changes are well known, predictable, and are occurring." CX 2 at 18. At this time, Dr. Maletz opined that the Claimant would need a total knee replacement of the left knee. *Id.* He noted that the Claimant was concerned with his ability to function at work. Dr. Maletz stated that no work restrictions would be given at that point but he would see the Claimant in six months. *Id.* The Claimant saw Dr. Maletz in February 2000 complaining of significant pain and difficulty walking. He was given an injection in the left knee. CX 2 at 15. On March 17, 2000, Dr. Maletz saw the Claimant again. He indicated that total knee replacement would be required but that the Claimant was attempting to delay this procedure for as long as possible. In January 2001, Dr. Maletz noted the Claimant had been laid off for the last several weeks and he has felt better. Dr. Maletz testified that he attributed this to the fact that the Claimant wasn't working and thus his knee symptoms subsided. CX 3 at 12-13. He explained that with an instage arthritic knee such as the Claimant had, activity including bending and squatting would increase the symptoms one would experience. CX 3 at 13.

By the February 27, 2003 office visit, the Claimant was experiencing greater stiffness, pain and noticeable deformity of the left knee. CX 2 at 12. In March 2003 Dr. Maletz ordered an MRI of the left knee. Dr. Maletz stated that the MRI showed a huge calcified mass behind the

Claimant's knee. CX 3 at 14, 29-31. He explained that it was a "Baker's cyst which is a degenerative phenomenon that occurs because of excessive fluid that's behind the knee." *Id*. Based upon the MRI and physical examination, on June 6, 2003 Dr. Maletz indicated the Claimant had marked varus of his left knee and severe pain with range of motion. He has no cartilage on the patellofemoral or medial femoral tibial joint. Dr. Maletz recommended a total knee replacement as the only treatment for the condition. CX 2 at 10. Dr. Maletz indicated he would be consulting with Dr. Salkin, his partner, who was also at Thames River Orthopaedic Group on the surgery. *Id*. The surgery was performed in December 2003 by Dr. Maletz. CX 2 at 4. Following surgery the Claimant had extensive physical therapy. CX 2 at 2-5. On December 21, 2004, Dr. Salkin assessed the Claimant with a 37% permanent impairment of the left knee. CX 3 at 16-17, CX 1. At that point Dr. Salkin also indicated that permanent restrictions remain which include no prolonged sitting or standing, no lifting greater than 10 to 15 pounds, no work in tight spaces, no ladders and no climbing. *Id*.

At deposition, Dr. Maletz explained that subsequent to the 1978 knee surgery the Claimant's work which required repetitive climbing, bending and lifting contributed to the degenerative process. CX 3 at 20-21. Dr. Maletz further stated that it was the degenerative process that eventually led to the need for total knee replacement surgery. *Id*. at 22. Therefore, he opined that the Claimant's work following the initial injury and surgery in 1977 and 1978, contributed to or accelerated the need for the subsequent surgery in 2003. CX 3 at 22-25. Dr. Maletz stated that if he were to apportion the percent of responsibility between the work injury at Electric Boat in 1977 and subsequent work activities after the 1977 injury and surgery, he would assign 80-90 percent responsibility to the 1977 injury and the remaining percent to the Claimant's subsequent work. *Id*.

4. Dr. Gerard Lawrence

On July 7, 2005, the Claimant was examined by Gerard Lawrence, M.D., at the request of the Employer. CX 4. On review of the Claimant's medical records and examination, Dr. Lawrence noted the Claimant had a total knee replacement due to degenerative changes. CX 5 at 1-3. With regard to specific issues the insurance carrier raised, Dr. Lawrence noted the Claimant's total meniscectomy in 1979, the multiple references to degenerative arthritic changes in the left knee in the 1970s and 1980s, and Dr, Maletz clear statement in 1999 that the Claimant had substantial degenerative change in the left knee. CX 4 at 3. Dr. Lawrence stated that there was no clear history of injury to the left knee in 1996 except the "usual repetitive trauma" in the course of his employment. CX 4 at 3-4. Dr. Lawrence opined that the repetitive trauma played a role in the Claimant's condition, but in his view it was a minor role. He attributed the knee condition mainly to the injury on October 3, 1977 which resulted in the surgery which led to the degenerative changes in the knee. *Id.* Although he stated that he did not think there was a specific injury to the knee in 1995-1996 which was a substantial contributor to the Claimant's overall knee condition, he did acknowledge that the Claimant experienced minor continuing exacerbation with the increasing forces on his knee subsequent to the initial injury and surgery in 1978 which assisted in his continued degenerative change. *Id.* at 4. Dr. Lawrence agreed that the Claimant's current knee condition is 90 percent the result of the initial 1977 knee injury and 10 percent the result of subsequent activity including his employment with Nova in 1995-96. *Id*.

Dr. Lawrence agreed with Dr. Maletz that the total meniscectomy is a known factor leading to degenerative arthritis. *Id*.

C. Timeliness[3]

1. Section 12-Notification

Section 12(a) of the LHWCA provides that notice of an injury for which compensation is payable must be given to the appropriate employer within 30 days after the injury, or within 30 days after the employee is aware of, or in the exercise of reasonable diligence or by reason of medical advice should have been aware of, a relationship between the injury or death and the employment. 33 U.S.C. § 912(a); *Bivens v. Newport News Shipbuilding & Dry Dock Co.,* 23 BRBS 233 (1990). The burden rests with the Claimant to establish timely notice. *Id.*

Claimant argues that he first became aware of the association between his employment at Nova Group and his work-related disability on March 30, 2005, when Dr. Maletz testified in his deposition that Claimant's occupation at Employer Nova Group contributed to the degenerative arthritic condition of Claimant's knee, hastening the need for surgery and worsening the arthritis that required surgery. TR at 23-24. Claimant contends that prior to Dr. Maletz's testimony there is no evidence to demonstrate that Claimant had any reason to believe that the cause of his debilitating knee injury could be contributed to anything but his prior work experience at Electric Boat Company. *Id.* Claimant notified Nova Group of the work-related injury on or about April 1, 2005, shortly after Dr. Maletz first indicated that Claimant's knee injury was at least partially caused by Claimant's work at Nova Group. Nova Group does not dispute that it was first notified of Claimant's injury on or around April 1, 2005, which falls within the 30 day period in which the employer must be notified of the injury.

Upon Claimant satisfying his or her initial burden of showing timely notification under Section 12, the burden then shifts to the employer to provide substantial evidence that the Claimant did not timely notify the employer of the injury in question. Nova Group fails to demonstrate that Claimant had any knowledge of the work-related aspect of his most recent knee injury or aggravation prior to Dr. Maletz's sworn testimony. Even assuming that notice was not timely given, Employer Nova Group does not show that it was prejudiced by any delay in receiving notice. The failure to provide timely notice pursuant to Section 12(a) will bar a claim unless such failure is excused under Section 12(d), 33 U.S.C. §912(d)(1994). Section 12(d)(2) provides that failure to give timely written notice does not bar a claim if employer has not been prejudiced by the delay. *See Kashuba*, 139 F.3d1273, 32 BRBS 62(CRT); *I.T.O. Corp. v. Director, OWCP [Aples],* 883 F.2d 422, 22 BRBS 126 (CRT)(5th Cir. 1989). Prejudice under Section 12(d)(2) may be established where employer provides substantial evidence that due to claimant's failure to provide timely written notice, it was unable to effectively investigate the claim to determine the nature and extent of the injury or to provide medical services. *Kashuba*, 139 F.3d at 1275, 32 BRBS at 64(CRT); *Bustillo v. Southwest Marine, Inc.*, 33 BRBS 15, 16 (1999); *see also I.T.O. Corp.,*883 F.2d at 422, 22 BRBS at 126(CRT).

[3] The parties concede that the Claimant's claim against EBC was timely. Therefore, the discussion on the issue of timeliness herein applies only to the Claimant's claim against Nova.

Because Employer Nova Group fails to demonstrate either that it was not timely notified of Claimant's injury, or that Claimant's untimely notice prejudiced Nova Group in a substantial way, I find that Claimant has satisfied the notification requirements of Section 12 of the LHWCA.

2. Section 13-Filing of Claim

Section 13(a) of the LHWCA states that the right to compensation for disability shall be barred unless the claim is filed within one year from the time the claimant becomes aware, or in the exercise of reasonable diligence should have been aware, of the relationship between the injury and the employment. 33 U.S.C. §913(a). *See Spear v. General Dynamics Corp*., 25 BRBS 254 (1991). It is firmly established that the initial burden is on the claimant to show that the filing of the claim was done within Section 13's prescribed time. *Romaniuk v. Locke*, 3 F.Supp 529 (D.N.Y. 1932).

Upon the claimant initially establishing that he or she successfully filed a claim within the statute of limitations provision established in Section 13 of the Act, the burden then shifts to the employer to demonstrate that the claim was not timely filed within the one-year statute of limitations. In order to successfully argue that the employee's claim is not timely filed, it is employer's burden to raise 33 USCS § 913 time constraints at initial hearing, rebut the Section 20 presumption, and demonstrate that time limitation was not complied with. *Peterson v Washington Metropolitan Area Transit Authority*, 13 BRBS 891 (1981).

To satisfy his initial burden, Claimant contends that the one-year statute of limitations, outlined in Section 13 of the Act, did not begin to run until the date Claimant became aware of the full character, extent, and impact of the injury. *See Paducah Marine Ways v. Thompson*, 82 F.3d 130 (6th Cir. 1996). Therefore, Claimant argues, the issue in question is the date of Claimant's awareness of the causal link between Claimant's employment with Nova Group and the left knee injury and/or disability. *See e.g. Martin v. Kaiser Company Inc*., 24 BRBS 12 (1990). As Claimant has previously shown, the established date on which Claimant first became aware of the causal link between his knee injury and his employment at Nova Group was on or around March 30, 2005. TR 69. Because it is uncontested that Claimant filed an appropriate claim under the Act within one year of March 30, 2005, Claimant has satisfied his initial burden under Section 13 of the Act.

Employer Nova Group fails to demonstrate that Claimant did not meet the Section 13 provisions of timely filing a claim. At no point does Nova Group allege that Claimant was aware of the causal link between his employment at Nova Group, the injury to his left knee, and a period of disability. By failing to demonstrate that Claimant had knowledge of the connection between his employment at Nova Group and his employment-related knee injury, Nova Group does little to support an argument that Claimant's claim was not filed within the one-year statute of limitations provided for in the Act. Because Nova Group has failed to demonstrate otherwise, I find that Claimant has properly demonstrated, with the assistance of Section 20's rebuttable presumptions, that the claim was properly filed following the provisions of Section 13 of the LHWCA.

D. Responsible Employer and Causation

In the present case it is uncontested that the Claimant suffered a serious knee injury during his employment at EBC from 1973 to 1989. JX 1. The Claimant severely twisted his knee by slipping on a plastic bag in 1977, which required a total meniscectomy and the complete removal of his knee cartilage. Despite the pain he experienced from the 1977 injury and subsequent knee surgery, and the additional continued pressure he endured as a result of the employment-related bending, crawling, and kneeling, Claimant maintained relatively constant employment in the construction field for several years thereafter. The Claimant testified that after his 1977 surgery he was told by his doctor to limit himself during his work, which specifically involved Claimant receiving a ride up "Heartbreak Hill" at EBC in order to reduce the amount of stress Claimant put on his knee. TR 67-68; CX 6-20-25; CX 7-1.[4] Claimant further testified that he also had similar work restrictions and physical limitations throughout the course of his employment with Nova. *Id.* Claimant testified that his 18-month period of employment at Nova Group consisted of similar bending, kneeling, crawling, and climbing, which aggravated, accelerated and/or exacerbated his underlying knee problems stemming from the 1977 injury at EBC and resulted in increased disability. *Id.* at 43-48. Claimant argues that his work requirements at Nova, which included crawling and bending, aggravated the underlying knee condition and were a contributing factor to the need for his 2003 total knee replacement surgery.

The Claimant argues that following his 1977 injury and initial left knee surgery in 1978 his subsequent work activities at both Electric Boat and Nova, a subsequent maritime employer, aggravated and accelerated his left knee degenerative arthritis necessitating a total knee replacement in 2003. Cl. Br. at 6-9. Electric Boat and Nova both deny liability for the Claimant's current knee condition. Electric Boat contends that the Claimant's work at Nova in 1995-96 aggravated his pre-existing knee condition constituting a new injury. EB Br. at 10-12. Thus, Electric Boat asserts that the subsequent injury is the compensable injury and Nova is the responsible employer. *Id*. Conversely, Nova argues that the Claimant's 1977 knee injury never fully resolved and contends there is no evidence supporting a substantial contribution to his knee condition as a result of his eighteen month employment at Nova in 1995-96. Accordingly, Nova asserts that the current knee problems related back to the 1977 injury and thus it is not the responsible employer. Nova Br. at 5-6.

An individual seeking benefits under the Act must, as an initial matter, establish that he suffered an "accidental injury…arising out of and in the course of employment." 33 U.S.C. § 902(2). *Bath Iron Works Corp. v. Brown*, 194 F.3d 1, 4 (1st Cir. 1999). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. *Preziosi v. Controlled Indus.*, 22 BRBS 468 (1989).

The aggravation rule has been described as follows by the Ninth Circuit:

> If the disability resulted from the natural progression of a prior injury and would have occurred notwithstanding the subsequent injury, then the prior injury is

[4] Other than getting a ride up the hill, the record does not clearly establish additional ongoing work restrictions following the 1977 injury.

> compensable and accordingly, the prior employer is responsible. If, on the other hand, the subsequent injury aggravated, accelerated, or combined with the claimant's prior injury, thus resulting in claimant's disability, then the subsequent injury is the compensable injury, and the subsequent employer is responsible. responsible. *Kelaita,* 799 F.2d at 1311. We have emphasized that "the aggravation [two-injury] rule applies 'even though the worker did not incur the greater part of his injury with that particular employer.' " *Port of Portland v. Director, OWCP,* 932 F.2d 836, 839-40 (9th Cir.1991) (quoting *Strachan Shipping Co. v. Nash,* 782 F.2d 513, 519 n. 10 (5th Cir.1986) (en banc).

Foundation Constructors, Inc. v. Director, OWCP, 950 F.2d 621, 624 (9th Cir. 1991); *see also, Bath Iron Works Corp. v. Dir. OWCP*, 244 F.3d 222, 228-230 (1st Cir. 2001); *New Haven Terminal Corp. v. Lake*, 337 F.3d 261 (2nd Cir. 2003); *Preston*, 380 F.3d 597. The aggravation rule can apply to injuries which are not caused by identifiable incidents, but which are gradually produced by work activities. Such cumulative injuries are classified as accidental injuries and not as occupational diseases, and liability attaches at the point of last exposure to injurious conditions or activities. *Foundation Constructors, Inc.*, 950 F.2d at 624.

The last aggravation need not be the primary contributor to the resulting injury. *Lopez v. Southern Stevedores*, 23 BRBS 295, 297 (1990). Further, the last aggravation does not need to interact with the pre-existing underlying injury itself to produce a worsening of the underlying impairment. The aggravation rule can apply in cases where the last aggravation combined with the underlying injury merely in an additive way and resulted in a greater overall impairment. *Port of Portland v. Director, OWCP*, 932 F.2d 836, 839 (9th Cir. 1991). The aggravation rule applies "even though the worker did not incur the greater part of his injury with that particular employer." *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 519 (5th Cir. 1986).

The key issue here is whether the Claimant's current disability as a result of his left knee condition results from the natural progression of the initial 1977 injury and would have occurred notwithstanding the subsequent injury or whether the Claimant's continued work activities of climbing, kneeling, and squatting aggravated, accelerated or exacerbated the prior injury resulting in the Claimant's disability. Under the facts presented here, resolution of this issue is a close call. The Claimant's physician, Dr. Maletz, stated that once an individual has a meniscectomy, which the Claimant had as a result of his 1977 knee injury, one might expect a total knee replacement would be required in the next 15 years. This testimony suggests that the total knee replacement the Claimant required in 2003, with its resultant increase in disability, was the natural consequence of his 1977 injury. However, while degenerative changes can be expected after the 1977 injury and corrective surgery in 1978, Dr. Maletz expressed his opinion that Claimant's work at Nova Group, which involved "repetitive squatting, climbing, lifting, carrying, [and] crawling," did in fact "accelerate or exacerbate the preexisting arthritis and create the need for [Claimant] to undergo a total knee replacement." CX 3 at 25. Moreover, in his July 8, 2005 letter, Dr. Lawrence stated that "[t]here is not a clear history of injury to the left knee in 1996, except the usual repetitive trauma that the patient would undergo in the course of his employment." CX 4 at 4. Dr. Lawrence opined that although he "do[es] not think that there…was a specific injury during 1995 and 1996," he does "think [Claimant] had a minor continuing exacerbation with increasing forces on his knee and (*sic*) assisted to his continued

degenerative change." *Id.* Dr. Lawrence is of the opinion that "the 1977 injury is probably 90 percent of the responsibility in the injury and from 1995 through 1996, some 10 percent." *Id.* Thus, both Dr. Maletz and the Employer's orthopedic physician, Dr. Lawrence, testified that the Claimant's continued work activities of bending, kneeling and climbing exacerbated and aggravated the degenerative process thereby accelerated the need for total knee replacement. Therefore, I conclude that the current disability is the result of the Claimant's continued repetitive kneeling, bending and climbing after the 1977 injury, that such repetitive work activity is a second injury and that the second injury is the compensable injury. As the last maritime employer to expose the Claimant to such repetitive activities Nova is the employer liable for the claim.

In determining whether an injury arose out of and in the course of employment, the Claimant is assisted by Section 20(a) of the Act, which creates a presumption that a claim comes within its provisions. 33 U.S.C. §920(a). The Claimant establishes a prima facie case by proving that he suffered some harm or pain and that working conditions existed which could have caused the harm. *Brown*, 194 F.3d at 4, *Merrill v. Todd Pacific Shipyards Corp.,* 25 BRBS 140 (1991); *Murphy v. S.C.A./Shayne Brothers*, 7 BRBS 309 (1977) *aff'd mem*. 600 F.2d 280 (D.C. Cir. 1979); *Kelaita v. Triple A Mach. Shop*, 13 BRBS 326 (1981). In presenting his case, the Claimant is not required to introduce affirmative evidence that the working conditions in fact caused his harm; rather, the Claimant must show that working conditions existed which *could* have caused his harm. *U.S. Industries/Federal Sheet Metal, Inc., v. Dir., OWCP (Riley),* 455 U.S. 608 (1982). In establishing that an injury is work-related, the Claimant need not prove that the employment-related exposures were the predominant or sole cause of the injury. If the injury contributes to, combines with, or aggravates a pre-existing disease or underlying condition, the entire resulting disability is compensable. *Independent Stevedore Co. v. O'Leary,* 357 F.2d 812 (9th Cir. 1966); *Rajotte v. General Dynamics Corp.,* 18 BRBS 85 (1986).

Once a claimant establishes a prima facie case, the Claimant has invoked the presumption, and the burden of proof shifts to the employer to rebut it with substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. *Bath Iron Works Corp. v. Dir., OWCP, (Shorette)*, 109 F.3d 53 (1st Cir. 1997); *Merrill*, 25 BRBS at 144; *Parsons Corp. of California v. Dir., OWCP,* 619 F.2d 38 (9th Cir. 1980); *Butler v. District Parking Management Co.*, 363 F. 2d 682 (D.C. Cir. 1966); *Kier v. Bethlehem Steel Corp.,* 16 BRBS 128 (1984). Under the substantial evidence standard, an employer need not establish another agency of causation to rebut the presumption; it is sufficient if a physician unequivocally states to a reasonable degree of medical certainty that the harm suffered by the worker is not related to employment. *O'Kelley v. Dept. of the Army/NAF*, 34 BRBS 39, 41-42 (2000); *Kier,* 16 BRBS at 128. If the claimant alleges that his employment aggravated a pre-existing condition, employer must produce substantial evidence that the injury was not aggravated by employment. *Rajotte v. General Dynamics Corp.*, 18 BRBS 85 (1986); *Bath Iron Works Corp. v. Preston*, 380 F.3d 597 (1st Cir. 2004). If the presumption is rebutted, it no longer controls, and the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *See Del Vecchio v. Bowers*, 196 U.S. 280 (1935); *Holmes v. Universal Maritime Serv. Corp.*, 29 BRBS 18 (1995); *Sprague v. Dir., OWCP,* 688 F. 2d 862 (1st Cir. 1982).

In support of his prima facie case, Claimant relies upon the medical opinions of his treating orthopedic surgeon physician ,Dr. Maletz, as well as Dr. Gerard Lawrence, an orthopedic surgeon who examined the Claimant on the Employers behalf. CX 3 at 6; EB EX 4. Based on the Claimant's testimony and Drs. Maletz's and Lawrence's medical opinions that Claimant's current left knee condition was exacerbated, aggravated and accelerated by employment-related activities following the 1977 injury, I find that the Claimant has shown that working conditions existed at Nova Group that could have aggravated his pre-existing degenerative knee condition. Thus, the Claimant has established his prima facie case and has successfully invoked the Section 20(a) presumption.

The burden now shifts to the Employer to rebut the presumption with substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. *Shorette*, 109 F.3d at 53; *Merrill*, 25 BRBS at 144. EBC argues that Claimant's work at Nova Group contributed, at least to some degree, to Claimant's need for his left knee replacement. EBC Br. 11. EBC relies, as does Claimant, on the testimony of Drs. Maletz and Lawrence to establish that there is no evidence to suggest that Claimant's need for his total knee replacement was the *sole* result of the natural and unavoidable progression of his Electric Boat injury in 1977. EBC Br. 11-12. Employer Nova Group contends that the Claimant's knee condition is not causally related to his employment at Nova Group during 1995 and 1996, but rather is solely a result of Claimant's severe knee injury during the course of his employment at Electric Boat in 1977, and Claimant's subsequent meniscectomy in 1978. Nova Br. at 5-6. However, Nova Group's expert medical witness, Dr. Lawrence, provides in his deposition that he is reasonably sure that based on his "professional training and experience and review of medical literature that it is more likely than not that the work at Nova Group exacerbated or contributed to the development of osteoarthritis" in Claimant's left knee. LM EX 2 at 27.

The testimony of Dr. Lawrence, taken as a whole, does not support Nova's position and instead supports the position of Electric Boat and the Claimant that his current knee condition was aggravated by his subsequent employment at Nova. Even given the relatively low threshold required to rebut the presumption, the testimony of Dr. Lawrence indicates that the Claimant's knee condition was aggravated by his subsequent employment at Nova and that his Nova employment at least accelerated or exacerbated the need for total knee replacement. Although, as Nova Group contends, Dr. Lawrence testified at his deposition that he may have attributed too much weight to Nova Group's responsibility for Claimant's knee injury in his prior written report, he nonetheless testified that it is more likely than not that Claimant's deteriorated knee condition was at least somewhat contributed to by Claimant's employment at Nova. LM EX 5 at 10 to 19, 27; Nova Br. at 6. Thus, taken in totality Dr. Lawrence's testimony is insufficient to break the chain and rebut the presumption of causation. Consequently, I conclude that Nova Group fails to rebut the presumption that Claimant's 18-month employment at Nova Group in 1995 and 1996 aggravated, accelerated or exacerbated the previous knee injury. *O'Kelley v. Dept. of the Army/NAF*, 34 BRBS 39, 41-42 (2000); *Kier v. Bethlehem Steel Corp*. 16 BRBS 128 (1984).

I have found that the Claimant's current left knee condition was aggravated by his subsequent employment at both Electric Boat and Nova Group. The aggravation rule provides

that liability for the injury attaches to the employer on the last day of work under the injurious conditions. *Kelaita*, *supra*. Although the evidence indicates that the Claimant's work activities following the 1977 injury at both Electric Boat and Nova aggravated or accelerated the degenerative process and the need for the subsequent total knee replacement surgery with resulting increased impairment, Nova was the last maritime employer for which the Claimant worked and thus it is the responsible employer.

E. Nature and Extent of Disability

The burden of proving the nature and extent of disability rests with the Claimant. *Trask v. Lockheed Shipbuilding Constr. Co.*, 17 BRBS 56, 59 (1980). Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept. Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for the Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. *Sproull v. Stevedoring Serv. of Am.*, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss, or a partial loss of wage earning capacity.

1. Nature of Disability

There are two tests for determining whether a disability is permanent. Under the first test, a Claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. *Trask,* 17 BRBS at 60. The question of when maximum medical improvement is reached is primarily a question of fact based upon medical evidence. *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988). An administrative law judge may rely on a physician's opinion in establishing the date of maximum medical improvement. *Miranda v. Excavation Constr., Inc.,* 13 BRBS 882 (1981). Under the second test, a disability may be considered permanent if the impairment has continued for a lengthy period and appears to be of lasting or indefinite duration. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir.1968) *cert. denied* 394 U.S. 976 (1969); *Air Am., Inc. v. Dir., OWCP,* 597 F.2d 773, 781-782 (1st Cir. 1979).

In this matter, there is no dispute as to the date the Claimant reached maximum medical improvement: The parties stipulate that the Claimant reached maximum medical improvement on December 21, 2004. JX 1. A residual disability, either partial or total, will be considered permanent if, and when, the employee's condition reaches a point of maximum medical improvement. *James v. Pate Stevedoring Co.*, 22 BRBS 271, 274 (1989). Since it is undisputed that Claimant has reached a state of maximum medical improvement, Claimant's disability is permanent in nature as of December 21, 2004.

Based on the lack of contradicting evidence, I find that Claimant's disability was temporary in nature from June 6, 2003 through December 20, 2004. Claimant testified, and Employer Nova Group has failed to successfully demonstrate otherwise, that Claimant has been

unable to work since on or around June 6, 2003. Based on this evidence, I find that Claimant's disability was temporary in nature from June 6, 2003 through December 20, 2004, when Claimant was shown to have reached maximum medical improvement.

2. Extent of Disability

The parties in this matter disagree as to whether the Claimant's permanent disability is total or partial. The Claimant contends that he has been unable to perform his regular work since June 3, 2003, and that he remains permanently and totally disabled. Cl. Br. at 13. The Claimant further argues that the Employer has failed to meet its burden of proving the availability of suitable alternate employment. *Id*. at 10. The Claimant requests temporary total disability benefits from June 3, 2003 through December 20, 2004. *Id.* at 13. Furthermore, the Claimant seeks permanent and total disability benefits from December 21, 2004 to the present and continuing. *Id.*.

A three-part test is employed to determine whether a claimant is entitled to an award of total disability compensation: (1) a claimant must first establish a *prima facie* case of total disability by showing that he cannot perform his former job because of a job-related injury; (2) upon this *prima facie* showing, the burden then shifts to the employer to establish that suitable alternative employment is readily available in the employee's community for individuals of the same age, experience, and education as the employee, which requires proof that "there exists a reasonable likelihood, given the claimant's age, education, and background, that he would be hired if he diligently sought the job"; and (3) the claimant can rebut the employer's showing of suitable alternative employment with evidence establishing a diligent, yet unsuccessful, attempt to obtain that type of employment. *Am. Stevedores v. Salzano* 538 F.2d 933 (2nd Cir. 1976); *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 434 (1st Cir. 1991); *Air Am., Inc. v. Dir. OWCP*, 597 F.2d 773 (1st Cir. 1979); (*Legrow*), *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031 (5th Cir.1981).

The Claimant has the initial burden of proving that he cannot return to his usual employment; *Elliott v. C & P Telephone Co.*, 16 BRBS 89, 91 (1984); which is defined as the regular duties a worker was performing at the time of injury. *Ramirez v. Vessel Jeanne Lou, Inc*., 14 BRBS 689, 693 (1982). The Claimant's testimony and the medical evidence provided demonstrate that Claimant is unable to return to his job as a carpenter since his total knee replacement. Claimant has difficulty standing and walking for extended periods of time, and testifies that he must ice and elevate his left knee at least 50% of the day everyday. TR 54-58. Claimant also suffers from a decreased range of motion, and experiences constant discomfort as a result of his chronic knee problems. *Id.* Claimant ultimately testifies that he is unable to secure any type of work due to his inability to keep a regular work schedule because of his limited mobility and the constant knee pain he experiences. *Id* at 72. Based on the Claimant's testimony, and the uncontradicted medical evidence that Claimant suffers from a severe knee disability which strictly limits his physical capabilities, I find that the Claimant has met his initial burden of establishing that he cannot return to his usual employment as a carpenter.

Since the Claimant has established that he is unable to return to his usual employment, the burden shifts to the employer to show that suitable alternative employment is readily

available in the Claimant's community for individuals with the same age, experience, and education. *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 434 (1st Cir. 1991) (*Legrow*). During the hearing, Employer Nova Group made an attempt to suggest that Claimant possesses the capacity to work as a security guard. TR 71-72. However, Claimant testified that he is unable to secure regular employment, specifically indicating that he would be unable to gainfully work as a security guard. *Id.* Additionally, it is the duty of the employer to provide evidence of actual, not theoretical, employment opportunities by identifying specific employment opportunities available to the employee given the employee's age, education, work experience, and physical limitations. *New Orleans (Gulfwide) Stevedores v. Turner*., 661 F.2d 1031, 1042-43, 14 BRBS 156, 164-65 (5th Cir. 1981). Employer Nova Group has failed to present any credible, specific jobs Claimant could do given his age, education, work experience, and physical limitations. Therefore, based on the absence of evidence of suitable alternative employment, I find the extent of Claimant's disability to be total.

F. Entitlement to Special Fund Relief

The Employer has applied for Special Fund Relief under Section 8(f) of the Act. This provision of the Act relieves the employer from part of the liability for permanent total disability when the disability is not due solely to the injury that is the subject of the claim. When Special Fund Relief is applicable, an employer's liability for payment of benefits under the Act is limited to no greater than a period of 104 weeks with the remaining compensation paid by a special fund established pursuant to 33 U.S.C. § 944. 33 U.S.C. § 908(f)(1); *Lawson v. Suwannee Fruit & Steamship Co.*, 336 U.S. 198, 200 (1949). The District of Columbia and Ninth Circuits explained the purpose of 8(f) relief as follows:

> [T]he Act makes the employer liable for compensation. Hence, the employer risks increased liability when he hires or retains a partially disabled worker. By virtue of the contribution of the previous partial disability, such a worker injured on the job may suffer a resulting disability greater than a healthy worker would have suffered. Were it not for the shifting of this increased compensation liability from the employer to the Special Fund under § 8(f), the Act would discourage employers from hiring and retaining disabled workers.

Director, OWCP v. Campbell Indus., 678 F.2d 836, 839 (9th Cir. 1982) (quoting *C & P Tel. Co. v. Director, OWCP*, 564 F.2d 503, 512 (D.C. Cir. 1977). To avail itself of relief under this provision, an employer or insurance carrier must file an application with the District Director (formerly the Deputy Commissioner), OWCP ("The District Director") pursuant to section 8(f)(3) which, as amended, provides:

> Any request, filed after September 28, 1984, for apportionment of liability to the special fund established under section 944 of this title for the payment of compensation benefits, and a statement of the grounds therefore, shall be presented to the deputy commissioner prior to the consideration of the claim by the deputy commissioner. Failure to present such request prior to such consideration shall be an absolute defense to the special fund's liability for the payment of any benefits in connection with such claim, unless the employer could

not have reasonably anticipated the liability of the special fund prior to the issuance of a compensation order.

33 U.S.C. § 908(f)(3).

The record shows that the Employer submitted a petition for Special Fund relief on June 29, 2005 while the claim was pending before the District Director. EX 2. The District Director issued a referral on July 7, 2005, indicating that permanency was an issue at the informal conference and that a copy of the Employer's 8(f) application was enclosed with the referral. Therefore, the Employer's request for Section 8(f) relief was timely filed and I will proceed to the merits of the Employer's application.[5] *Tennant v. Gen. Dynamics Corp.*, 26 BRBS 103, 107 (1992) (where the absolute defense is asserted, the administrative law judge cannot consider the merits of the employer's section 8(f) application before initially considering whether the request submitted to the District Director was sufficiently documented).

In addition to timely filing a sufficiently documented application, an employer in a permanent and total disability case must meet three requirements to avail itself of section 8(f) relief: (1) the employee must have a pre-existing permanent partial disability; (2) the pre-existing disability must have been manifest to the Employer; and (3) the employee's permanent total disability must not be solely due to the subsequent injury. *Director, OWCP v. Gen. Dynamics Corp.,* 982 F.2d 790, 793 (2nd Cir. 1992); *Director, OWCP v. Luccitelli*, 964 F.2d 1303, 1305 (2nd Cir. 1992) (*Luccitelli*).

In its post-hearing brief, the Employer asserts that it meets the above-listed requirements under the theory that the Claimant's underlying degenerative condition of his left knee was a pre-existing injury that was manifest to the employer and worsened the Claimant's permanent disability. Nova Br at 6-7.

As detailed below, I conclude that the Employer meets the requirements for Section 8(f) relief on its theory that the Claimant's underlying degenerative knee condition was a manifest pre-existing injury without which the Claimant would not be totally disabled.

1. Pre-Existing Disability

The Employer argues that the Claimant had a history of knee problems which caused permanent partial disability before the aggravation of his injury during his employment at Nova Group during 1995 through 1996. Nova attempts to demonstrate the preexisting injury by providing: (1) uncontested evidence that Claimant suffered a serious knee injury in 1977 during the course of employment at Electric Boat, and was required to undergo knee surgery in 1978 in an attempt to alleviate some of the pain associated with that injury; (2) complete medical records extensively documenting the relatively continuous medical attention Claimant received for problems relating to the 1977 work-related injury; and (3) testimony from the Claimant himself

[5] The District Director bears the burden of affirmatively raising the absolute bar as a defense, and has not done so here. 20 C.F.R. § 702.321; *Wiggins v. Newport Shipbuilding and Dry Dock Co.*, 31 BRBS 142 (1997); *Abbey v. Navy Exch.*, 30 BRBS 139, 141 (1996).

that throughout his post-surgery employment at EBC--and continuing through his employment at Nova Group--Claimant had work restrictions and physical limitations, i.e., possessing a pass that allowed him to receive a ride up the hill at the U.S. Naval Submarine Base in Groton, CT. TR 67-68.

2. Manifest to Employer

The Board has held that "[i]t is well established that a pre-existing disability will meet the manifest requirement of Section 8(f) if prior to the subsequent injury, employer had actual knowledge of the pre-existing condition or there were medical records in existence prior to the subsequent injury from which the condition was objectively determinable." *Esposito v. Bay Container Repair Co.*, 30 BRBS 67, 68 (1996). Nova offers no evidence to support the argument that Mr. Kwasniewski's pre-existing condition was manifest. However, the record indicates that there is overwhelming medical documentation establishing that the Claimant's deteriorated knee condition existed well before he began his employment at Nova Group. Medical records demonstrating the existence of Claimant's severe knee problems and a permanent impairment rating stemming from his course of employment at EBC were submitted.

Specifically, the office and operative notes of Claimant's original doctor, Dr. Louis Coulson, extensively detail the significant problems Claimant had with his original 1977 left knee injury and subsequent 1978 left knee surgery. CX 6 at 1-25. Dr. Coulson treated Claimant regularly for over ten years, and initially diagnosed a medial meniscus tear in Claimant's left knee. *Id.* at 2. The medical reports indicate continuous treatment by Dr. Coulson of Claimant for Claimant's left knee injury as well as the assessment of a permanent impairment rating for the left knee. Additionally, the office notes of Dr. Sprafke, with whom Claimant sought treatment upon Dr. Coulson's retirement, continue to highlight the existence of a previous knee injury prior to Claimant's employment with Nova Group. CX 7 at 1-5. Throughout Dr. Sprafke's medical notes, which span from 1988 through 1994, it is noted that Claimant continued to experience pain in his left knee relating back to his 1977 injury and subsequent open meniscectomy in 1978. *See Id.*; CX 7-5.

To meet the manifest requirement, medical records need not show the severity or exact nature of the pre-existing condition. *Wiggins v. Newport Shipbuilding & Dry Dock Co.*, 31 BRBS 142, 147 (1997). Medical records available to the employer prior to the work injury satisfy the requirement if they contain "sufficient information regarding the existence of a serious lasting problem which would motivate a cautious employer to consider terminating the employee because of the risk of compensation liability." *Dir., OWCP v. Gen. Dynamics Corp.*, 980 F.2d 74, 81 (1st Cir. 1992); *See also*, *Wiggins*, 31 BRBS at 147. Based on the evidence provided in the record, I find that Claimant's preexisting knee injury was objectively determinable and manifest to Employer Nova Group.

3. Whether the Total Disability Is Solely Attributable to Subsequent Injury

The Employer must satisfy the third and final requirement for Special Fund Relief by establishing the Claimant's current permanent and total disability as not solely attributable to the subsequent work injury in 1995-1996. That is, the Employer "must show, by medical or other

evidence, that a claimant's subsequent injury *alone* would not have caused the claimant's total permanent disability." *Luccitelli*, 964 F.2d at 1306 (italics in original); *see Sealand Terminals, Inc. v. Gaspric,* 7 F.3d 321, 323 (2d Cir. 1993).

In this case, the extent to which the Claimant's pre-existing conditions contributed to his permanent total disability is clear. In his deposition, Dr. Maletz testified that the pre-existing knee injury played a substantial role in causing Claimant's disability. CX 3 at 23. Dr. Maletz estimated that the 1977 injury while at EBC contributed approximately 80 to 90% to the Claimant's overall knee deterioration. *Id*. Dr. Maletz supports this estimation by saying that Claimant's work at Nova Group--assuming it involved extensive bending, kneeling, squatting, and climbing--would contribute or exacerbate the preexisting knee pain and arthritis suffered by Claimant. CX 3 at 25.

Dr. Lawrence, in his July 8, 2005 medical opinion of Claimant, concurs with Dr. Maletz's and Dr. Sprafke's opinions that Claimant's 1977 injury contributed approximately 90% to Claimant's knee disability, and that Claimant's employment at Nova Group contributed approximately 10% percent to Claimant's disability. CX 4 at 4.

Such medical observations by Drs. Maletz and Lawrence establish that Claimant's 2003 total knee replacement surgery and subsequent disability are due to the combined effects of the 1977 injury and aggravation of that injury resulting from Claimant's subsequent employment at Nova Group. The Claimant had a 20% permanent impairment rating following the 1977 injury. After aggravating his knee condition through repetitive work over the next 23 years, necessitating knee replacement surgery the Claimant's permanent impairment rating increased to 37%. Thus, Nova has established that the Claimant's total disability is not due solely to the subsequent injury.

Based on the foregoing findings, I conclude that Nova Group has established that it is entitled to liability relief from the Special Fund. Since Nova Group has proven the elements of Section 8(f) relief, its permanent total disability compensation liability is limited to the statutory period of 104 weeks. *See Adams v. Newport News Shipbuilding & Dry Dock Co*., 22 BRBS 78, 86 (1989).

G. Electric Boat's Entitlement to Reimbursement from Nova

It is undisputed that Electric Boat paid for the Claimant's total knee replacement surgery in December 2003 and paid the Claimant temporary total disability compensation benefits from June 6, 2003 through September 1, 2005. JX 1. Electric Boat argues that it is entitled to reimbursement from Nova and its carriers for the compensation benefits paid to the Claimant during the period June 6, 2003 through September 1, 2005 and medical expenses paid for the knee condition from August 18, 1996, the last day the Claimant worked at Nova. EB Br. at 12. Nova does not address the issue in its brief. The Board has recently determined that the issue of the responsible employer is integral to a Claimant's entitlement to benefits, and the administrative law judge or the Board has jurisdiction to address the reimbursement issue as between two carriers. *Kirkpatrick v. B.B.I. Incorporated*, BRB No. 05-0123 (October 12, 2005). In the present case, there are two employers, Electric Boat and Nova. I have determined that

Nova is the responsible employer for medical benefits for the left knee condition from the last date of the Claimant's employment and for compensation benefits beginning June 6, 2003. Accordingly, Nova is to reimburse Electric Boat for the portion of the medical benefits paid after August 18, 1996, the Claimant's last day of work at Nova and compensation benefits awarded herein which Electric Boat has paid to the Claimant.

H. Compensation Due

Based on the foregoing findings, the Claimant is entitled to temporary total disability benefits from June 6, 2003 through December 20, 2004. In addition, the Claimant is owed a continuing period of permanent total disability compensation pursuant to Section 8(a) of the Act from December 21, 2004 to the present and continuing, in an amount equal to 66 2/3 percent of his stipulated average weekly wage of $1072.00.

I. Medical Care

Under Section 7 of the Act, a claimant who suffers a work-related injury is entitled to reasonable and necessary medical treatment. 33 U.S.C. §907(a); *Dupre v. Cape Romain Contractors, Inc.*, 23 BRBS 86 (1989); *Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). I have determined that the Claimant's knee condition is related to his work at Nova Group. The Claimant is, therefore, entitled to medical care for the condition. As the responsible party, the Employer Nova Group in the instant matter thus remains liable for this Claimant's medical benefits. Accordingly, I conclude that the Employer and Carrier shall pay the Claimant for medical expenses reasonably and necessarily incurred as a result of the Claimant's work-related knee condition. *Colburn v. General Dynamics Corp.,* 21 BRBS 219, 222 (1988).

J. Attorney Fees

Having successfully established his right to compensation, the Claimant is entitled to an award of attorney fees under section 28 of the Act. *American Stevedores v. Salzano* 538 F. 2d 933, 937 (2nd Cir. 1976). The Claimant's attorney filed a fee application on December 30, 2005. Electric Boat has filed a limited objection to the fee application. Nova Group and Liberty Mutual shall have fifteen days from the date this Decision and Order is served by the District Director to file any objection to the Claimant's attorney fee petition.

K. Conclusion

In sum, I have found that the Claimant's knee condition was aggravated by his work for the Employer Nova Group and that he is entitled to compensation under the Act. The Claimant is entitled to temporary total disability benefits from June 6, 2003 through December 20, 2004. Thereafter, the Claimant is entitled to permanent and total disability benefits for a continuing period from December 21, 2004 to the present and continuing.

III. ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law and upon the entire record, including the parties' stipulations, the following order is entered:

1) The Employer Nova Group and Carrier shall pay directly to the Claimant, Matthew Kwasniewski, temporary total disability benefits at a rate of 66 2/3 percent of the Claimant's average weekly wage of $1072.00 from June 6, 2003 through December 20, 2004 pursuant to 33 U.S.C. § 908(b);

2) The Employer Nova Group and Carrier shall pay to the Claimant permanent and total disability compensation benefits beginning on December 21, 2004 and continuing for a period of 104 weeks at a rate of 66 2/3 percent of his average weekly wage of $1072.00 pursuant to 33 U.S.C. § 908(a);.

3) Commencing on the expiration of 104 weeks of permanent total disability compensation payments, the Special Fund shall assume liability for payment of the Claimant's permanent and total disability benefits pursuant to 33 U.S.C. § 908(f);

4) The Employer Nova Group and Carrier shall furnish the Claimant with such reasonable, appropriate and necessary medical care and treatment as the Claimant's employment-related knee condition may require pursuant to 33 U.S.C. § 907;

5) Nova Group shall reimburse Electric Boat for medical expenses paid for the treatment of the Claimant's left knee condition after August 18, 1996 and for temporary total disability compensation benefits paid from June 6, 2003 to September 1, 2005;

6) The Employer and Carrier shall have fifteen days from the date this Decision and Order are served by the District Director to file any objections to the Claimant's attorney fee application;

7) All computations of benefits and other calculations provided for in this Order are subject to verification and adjustment by the District Director.

SO ORDERED.

A

COLLEEN A. GERAGHTY
Administrative Law Judge

Boston, Massachusetts